UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Larry Crow,

Plaintiffs,

v.

Wolpoff & Abramson

Defendant.

Case No. 06-cv-3228 PAM/JSM

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DEFENDANTS SIXTH AFFIRMITIVE DEFENSE

Oral Argument Requested

INTRODUCTION

In his Complaint dated July 13, 2006, Plaintiff alleges violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), by Defendant Wolpoff & Abramson (hereinafter "Defendant Wolpoff" or "Defendant"). In the Sixth Affirmative Defense of Defendant's Answer, Defendant alleges:

> That Plaintiff and Plaintiff's counsel's pursuit of Defendant is in bad faith and solely to harass and annoy, entitling Defendant to an award of attorney's fees, as well as their costs and disbursements incurred herein as sanctions, and that if Plaintiff and Plaintiff's counsel continues to prosecute further this litigation or fails to immediately dismiss this lawsuit, will be in violation of Fed. R. Civ. P. 11, 28 U.S.C. § 1927 and 15 U.S.C. § 1692k(a)(3) and will be liable for Defendant's attorneys fees and costs for multiplying the proceedings in this case unreasonably

> and vexatiously, asserting claims solely to harass and annoy Defendant and in asserting claims contrary to the applicable law in this area.

(Answer at. Pp. 4)

Plaintiff now seeks to have Defendant's Sixth Affirmative Defense stricken under Rule 12(f), on the grounds that the defense is insufficient and scandalous.

STATEMENT OF FACTS

Sometime prior to April 2003, Plaintiff had a cellular telephone account with AT&T. The telephone number associated with the account was 651-270-2343, and the account number was 1558103. In or about April 2003, Plaintiff terminated his account with AT&T, and the telephone number (651-270-2343) was then assigned to a Vince Gagne. The billing information and password was changed and transferred to Gange as well, and Plaintiff ceased receiving billing invoices or any information on account #1558103. *(Verified Complaint at. 5-7)*

Sometime prior to May 15, 2006, AT&T sold account #1558103 to Palisades Collection LLC. On May 15, 2006, Defendant on behalf of Palisades Collection LLC., caused to be sent to Plaintiff a dunning communication demanding that he pay $1,305.38, on the old AT&T account that was terminated in April 2003. Plaintiff received the letter on or about May 24, 2006, and then responded with a 15 U.S.C. § 1692g(b) dispute and validation letter of his own to Defendant dated June 22, 2006, which he mailed that date. However, Defendant failed to respond to Plaintiff in accordance with 15 U.S.C. § 1692g(b), and instead sent Plaintiff a threatening letter dated June 28, 2006, entitled

"NOTICE OF INTENT TO SUE". *(Verified Complaint at. 8-11)* Subsequently, Plaintiff initiated the instant lawsuit.

ARGUMENT

1. PLAINTIFFS MOTION TO STRIKE SHOULD BE GRANTED BECAUSE DEFENDANT'S SIXTH AFFIRMATIVE DEFENSE IS INSUFFICIENT AS A MATTER OF LAW, AND IS SCANDALOUS.

Under Rule 12(f), the court may order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. *Fed.R.Civ.P. 12(f); Semmelman v. Mellor*, 2006 WL 90094 (D. Minn. Jan 13, 2006). As is demonstrated below, Defendant's Sixth Affirmative Defense should be stricken because the defense is insufficient and scandalous.

a. DEFENDANT'S SIXTH AFFIRMATIVE DEFENSE IS LEGALLY INSUFFICIENT.

While motions to strike are not generally favored, they are properly granted when there are no questions of fact, and the purported defense is insufficient as a matter of law. *Fed.R.Civ.P. 12(f); Resolution Trust Corporation v. Greenwood*, 798 F.Supp. 1391 (D. Minn. 1992); Citing *Federal Deposit Ins. Corp. v. Carlson*, 698 F.Supp. 178, 178-79 (D.Minn.1988); See also *Fredin v. Sharp,* 176 F.R.D. 304 (D. Minn. 1997)*;* Citing *Lunsford v. United States,* 570 F.2d 221, 229 (8th Cir. 1977)(a motion to strike a defense will be denied if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear).

Rule 8(c) of the Federal Rules of Civil Procedure determines whether the pleading of an affirmative defense is "sufficient." *See Wyshak v. City National Bank,* 607 F.2d 824, 827 (9th Cir.1979).

Rule 8(c) provides:

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed. R. Civ. P. 8. (2006).

Notably, allegations of Rule 11, or 15 U.S.C. 1692k(a)(3) violations are absent from the affirmative defenses listed in Rule 8(c), and are not "any other matter constituting an avoidance or affirmative defense".

At least one federal court has had the opportunity to address this issue, and has held that an affirmative defense which alleges violations of Rule 11 is improper, and does not qualify as affirmative defense. See *Yash Raj Films (USA) Inc. v. Atlantic Video*, 2004 WL 1200184 (N.D. Ill. May 28, 2004)(unspecified allegations of Rule 11 violations are improper and do not qualify as an affirmative defense). In reaching its conclusion, the court in *Yash* additionally noted that allegations of Rule 11 violations were procedurally improper, as Rule 11 requires that allegations of Rule 11 violations be brought within a separate motion. *Fed. R. Civ. P. 11(1)(a); Steinlage v. Mayo Clinic Rochester*, 235

F.R.D. 668 (D. Minn. 2006) (Party-initiated motions for Rule 11 sanctions must comply with its procedural requirements, including the 21-day safe harbor); Citing *Gordon v. Unifund CCR Partners,* 345 F.3d 1028, 1030 (8th Cir. 2003) (district court abuses discretion to issue Rule 11 sanctions when party did not comply with procedural requirements).

This case is a classic example where a Motion to Strike an affirmative defense should be granted. Defendant's allegations of Rule 11 and 15 U.S.C. 1692k(a)(3) violations do not qualify as affirmative defenses under Fed. R. Civ. P. 8(c), and are therefore legally insufficient as a matter of law, are procedurally ineffective, and should consequently be stricken pursuant to Fed. R. Civ. P. 12(f).

b. DEFENDANT'S SIXTH AFFIRMATIVE DEFENSE SHOULD BE STRICKEN AS SCANDALOUS.

Under Rule 12(f), a trial court may strike those parts of a pleading which are "redundant, immaterial, impertinent or scandalous." *Fed. R .Civ. P. 12(f)*; *Semmelman v. Mellor*, 2006 WL 90094 (D. Minn. Jan 13, 2006). While motions to strike are not generally favored, they are properly granted when the challenged matter is scandalous. See *Fed.R.Civ.P. 12(f); Skaggs v. Subway Real Estate Corp.*, 2006 WL 1042337 (D. Conn. April 19, 2006) (Generally motions to strike are disfavored and are usually granted only for scandalous material); *Cabble v. Rollieson*, 2006 WL 464078 (S.D.N.Y. February 27, 2006) (Motions to strike are disfavored and are generally granted only when the challenged matter is scandalous); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine*

Distributors Pty., 647 F.2d 200 (C.A.D.C. 1981); citing *5 C. Wright & A. Miller, Federal Practice and Procedure* § 1382, at 827 (1969)(disfavored character is relaxed “in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the subject of the allegations”).

Scandalous matters generally consist of allegations which unnecessarily reflect upon the moral character of an individual, or recount matters which are repulsive or which employ language that detracts from the dignity of the Court. *In re Potash*, 1994 WL 1108312 (D. Minn. Dec 05, 1994); Citing *Agran v. Isaacs,* 306 F.Supp. 945, 948 (N.D. Ill. 1969). Allegations that Plaintiff and Plaintiff’s counsel have filed a lawsuit in bad faith are not only scandalous in nature, but as discussed above, are properly brought before the court by separate motion made under Rule 11, or at the conclusion of trial under 15 U.S.C. 1692k(a)(3). See *Fed. R. Civ. P. 11*; 15 U.S.C. 1692k(a)(3); *Bailey v. Clegg*, 1991 WL 143461 (N.D. Ga. June 14, 1991)(Order striking affirmative defense which stated that Plaintiff’s counsel had acted improperly and unethically in violation of 15 U.S.C. § 1692k(a)(3); noting that those allegations might unduly influence a jury, and were procedurally ineffective because such allegations should be proven after Defendant prevailed on the merits).

In this case, there is no proper purpose for the allegations in Defendant’s Sixth Affirmative Defense, the allegations are scandalous because they improperly cast a negative light on Plaintiff and Plaintiff’s counsel, and could negatively impact a jury.

Furthermore, Defendant's allegations are legally insufficient because they do not qualify as affirmative defenses under Rule 8, are procedurally ineffective under Rule 11, and untimely under 15 U.S.C. § 1692k(a)(3). Consequently, Defendant's Sixth Affirmative Defense, which is only presented to harass, intimidate, and insult Plaintiff and Plaintiff's counsel should therefore be properly stricken under Rule 12(f).

CONCLUSION

For the above stated reasons, Plaintiff respectfully request that Defendant's Sixth Affirmative Defense be stricken pursuant to Fed. R. Civ. P. 8 and 12(f).

Respectfully submitted,

Dated this 14th day of November, 2006.

CONSUMER JUSTICE CENTER, P.A.

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